

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

6 KASI A. FOSS,)
7 Plaintiff,)
8 v.)
9 MICHAEL J. ASTRUE,)
10 Commissioner of Social)
11 Security,)
Defendant.)
) No. CV-07-0091-AMJ
) REPORT AND RECOMMENDATION

13 BEFORE THE COURT are cross-motions for summary judgment,
14 noted for hearing without oral argument on October 9, 2007. (Ct.
15 Rec. 16, 19). Plaintiff Kasi Foss ("Plaintiff") filed a reply
16 brief on September 27, 2007. (Ct. Rec. 21). Attorney Maureen
17 Rosette represents Plaintiff; Special Assistant United States
18 Attorney Daphne Banay represents the Commissioner of Social
19 Security ("Commissioner"). The parties have not filed a recent
20 consent to proceed before a magistrate judge. (See, Ct. Rec. 14).
21 After reviewing the administrative record and the briefs filed by
22 the parties, the court recommends **granting** Defendant's Motion for
23 Summary Judgment (Ct. Rec. 19) and **denying** Plaintiff's Motion for
24 Summary Judgment (Ct. Rec. 16).

JURISDICTION

26 On April 8, 2004, Plaintiff filed applications for Disability
27 Insurance Benefits ("DIB") and Supplemental Security Income
28 ("SSI") benefits alleging disability since June 6, 2003.

1 (Administrative Record ("AR") 46-48, 299-302). Plaintiff's
 2 application for SSI was denied initially and on reconsideration.
 3 An administrative hearing was held before Administrative Law Judge
 4 ("ALJ") Paul L. Gaughen on August 9, 2006. (AR 306-328). On
 5 October 12, 2006, the ALJ issued a decision finding that Plaintiff
 6 was not disabled. (AR 17-26). On February 27, 2007, the Appeals
 7 Council denied Plaintiff's request for review. (AR 5-7).
 8 Therefore, the ALJ's decision became the final decision of the
 9 Commissioner, which is appealable to the district court pursuant
 10 to 42 U.S.C. § 405(g). Plaintiff filed this action for judicial
 11 review pursuant to 42 U.S.C. § 405(g) on March 23, 2007. (Ct.
 12 Rec. 1).

13 **STATEMENT OF FACTS**

14 The facts have been presented in the administrative hearing
 15 transcripts, the ALJ's decisions, the briefs of both Plaintiff and
 16 the Commissioner and will only be summarized here. Plaintiff was
 17 37 years old on the date of the August 9, 2006 administrative
 18 hearing, has a high school plus education and has past work
 19 experience as a product distributor, a certified care giver and a
 20 clerical/parcel carrier. (AR 58, 61, 312). She alleges
 21 disability as of June 6, 2003, due to severe tendinitis in both
 22 arms and hands, severe depression, and anxiety. (AR 52).
 23 Plaintiff reported that she stopped working because "[i]t was to
 24 [sic] hard & my doctor felt it was needed." (AR 52).

25 **STANDARD OF REVIEW**

26 _____ Congress has provided a limited scope of judicial review of a
 27 Commissioner's decision. 42 U.S.C. § 405(g). A court must uphold
 28 the Commissioner's decision, made through an ALJ, when the

1 determination is not based on legal error and is supported by
 2 substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995
 3 (9th Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir.
 4 1999). "The [Commissioner's] determination that a plaintiff is
 5 not disabled will be upheld if the findings of fact are supported
 6 by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572
 7 (9th Cir. 1983) (citing 42 U.S.C. § 405(g)). Substantial evidence
 8 is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d
 9 1112, 1119 n.10 (9th Cir. 1975), but less than a preponderance.
 10 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989);
 11 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d
 12 573, 576 (9th Cir. 1988). Substantial evidence "means such
 13 evidence as a reasonable mind might accept as adequate to support
 14 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)
 15 (citations omitted). "[S]uch inferences and conclusions as the
 16 [Commissioner] may reasonably draw from the evidence" will also be
 17 upheld. *Mark v. Celebreeze*, 348 F.2d 289, 293 (9th Cir. 1965).
 18 On review, the court considers the record as a whole, not just the
 19 evidence supporting the decision of the Commissioner. *Weetman v.*
 20 *Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989) (quoting *Kornock v.*
 21 *Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

22 It is the role of the trier of fact, not this court, to
 23 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If
 24 evidence supports more than one rational interpretation, the court
 25 may not substitute its judgment for that of the Commissioner.
 26 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
 27 (9th Cir. 1984). Nevertheless, a decision supported by
 28 substantial evidence will still be set aside if the proper legal

1 standards were not applied in weighing the evidence and making the
 2 decision. *Brawner v. Secretary of Health and Human Services*, 839
 3 F.2d 432, 433 (9th Cir. 1988). Thus, if there is substantial
 4 evidence to support the administrative findings, or if there is
 5 conflicting evidence that will support a finding of either
 6 disability or nondisability, the finding of the Commissioner is
 7 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir.
 8 1987).

9 **SEQUENTIAL EVALUATION PROCESS**

10 The Social Security Act (the "Act") defines "disability" as
 11 the "inability to engage in any substantial gainful activity by
 12 reason of any medically determinable physical or mental impairment
 13 which can be expected to result in death or which has lasted or
 14 can be expected to last for a continuous period of not less than
 15 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The
 16 Act also provides that a Plaintiff shall be determined to be under
 17 a disability only if his impairments are of such severity that
 18 Plaintiff is not only unable to do his previous work but cannot,
 19 considering Plaintiff's age, education and work experiences,
 20 engage in any other substantial gainful work which exists in the
 21 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).
 22 Thus, the definition of disability consists of both medical and
 23 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156
 24 (9th Cir. 2001).

25 The Commissioner has established a five-step sequential
 26 evaluation process for determining whether a person is disabled.
 27 20 C.F.R. §§ 404.1520, 416.920. Step one determines if he is
 28 engaged in substantial gainful activities. If he is, benefits are

1 denied. 20 C.F.R. §§ 404.1520(b), 416.920(b). If he is not, the
2 decision maker proceeds to step two, which determines whether
3 Plaintiff has a medically severe impairment or combination of
4 impairments. 20 C.F.R. §§ 404.1520(c), 416.920(c).

5 If Plaintiff does not have a severe impairment or combination
6 of impairments, the disability claim is denied. If the impairment
7 is severe, the evaluation proceeds to the third step, which
8 compares Plaintiff's impairment with a number of listed
9 impairments acknowledged by the Commissioner to be so severe as to
10 preclude substantial gainful activity. 20 C.F.R. §§ 404.1520(d),
11 416.920(d); 20 C.F.R. § 404 Subpt. P App. 1. If the impairment
12 meets or equals one of the listed impairments, Plaintiff is
13 conclusively presumed to be disabled. If the impairment is not
14 one conclusively presumed to be disabling, the evaluation proceeds
15 to the fourth step, which determines whether the impairment
16 prevents Plaintiff from performing work he has performed in the
17 past. If Plaintiff is able to perform his previous work, he is
18 not disabled. 20 C.F.R. §§ 404.1520(e), 416.920(e). If Plaintiff
19 cannot perform this work, the fifth and final step in the process
20 determines whether Plaintiff is able to perform other work in the
21 national economy in view of his residual functional capacity and
22 his age, education and past work experience. 20 C.F.R. §§
23 404.1520(f), 416.920(f); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

24 The initial burden of proof rests upon Plaintiff to establish
25 a *prima facie* case of entitlement to disability benefits.
26 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v.*
27 *Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is
28 met once Plaintiff establishes that a physical or mental

1 impairment prevents him from engaging in his previous occupation.
2 The burden then shifts to the Commissioner to show (1) that
3 Plaintiff can perform other substantial gainful activity and (2)
4 that a "significant number of jobs exist in the national economy"
5 which Plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498
6 (9th Cir. 1984).

7 **ALJ'S FINDINGS**

8 The ALJ found at step one that Plaintiff has not engaged in
9 substantial gainful activity at any time relevant to his decision.
10 (AR 19). At step two, the ALJ determined that Plaintiff has left
11 ankle post traumatic osteoarthritis and bilateral wrist pain, left
12 greater than right, but that Plaintiff does not have an impairment
13 or combination of impairments that causes more than minimal
14 functional limitations. (AR 19-26). The ALJ thus determined that
15 Plaintiff does not have a severe impairment as defined in the
16 Social Security Act. (AR 19-26). Accordingly, the ALJ concluded,
17 at step two of the sequential evaluation process, that Plaintiff
18 was not disabled within the meaning of the Social Security Act.
19 (AR 26).

20 **ISSUES**

21 Plaintiff contends that the Commissioner erred as a matter of
22 law. She specifically argues that:

23 1. The ALJ erred at step two of the sequential evaluation
24 process by concluding that Plaintiff has no severe medically
25 determinable impairment(s); and

26 2. The ALJ failed to provide proper rationale for rejecting
27 Plaintiff's symptom testimony.

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1 This court must uphold the Commissioner's determination that
2 Plaintiff is not disabled if the Commissioner applied the proper
3 legal standards and there is substantial evidence in the record as
4 a whole to support the decision.

DISCUSSION

6 | A. Plaintiff's Credibility

7 Plaintiff argues that the ALJ failed to provide specific,
8 clear and convincing reasons why her testimony regarding her
9 ability to sit, stand, walk, drive, lift, carry and use her arms
10 was rejected. (Ct. Rec. 17 at 13-15). The Commissioner asserts
11 that the ALJ provided clear and convincing reasons to reject
12 Plaintiff's subjective complaints as being not entirely credible.
13 (Ct. Rec. 20 at 14-19).

14 It is the province of the ALJ to make credibility
15 determinations. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir.
16 1995). However, the ALJ's findings must be supported by specific
17 cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir.
18 1990). Once Plaintiff produces medical evidence of an underlying
19 impairment, the ALJ may not discredit Plaintiff's testimony as to
20 the severity of an impairment because it is unsupported by medical
21 evidence. *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998)
22 (citation omitted). Absent affirmative evidence of malingering,
23 the ALJ's reasons for rejecting Plaintiff's testimony must be
24 "clear and convincing." *Lester v. Chater*, 81 F.3d 821, 834 (9th
25 Cir. 1995). "General findings are insufficient: rather the ALJ
26 must identify what testimony is not credible and what evidence
27 undermines the claimant's complaints." *Lester*, 81 F.3d at 834;
28 *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993). The ALJ may

1 consider at least the following factors when weighing Plaintiff's
2 credibility: Plaintiff's reputation for truthfulness,
3 inconsistencies either in her testimony or between her testimony
4 and her conduct, Plaintiff's daily activities, Plaintiff's work
5 record, and testimony from physicians and third parties concerning
6 the nature, severity, and effect of the symptoms of which she
7 complains. *Thomas v. Barnhart*, 278 F.3d 947, 958-959 (9th Cir.
8 2002). If the ALJ's credibility finding is supported by
9 substantial evidence in the record, we may not engage in second-
10 guessing. *Id.* at 959.

11 The ALJ considered the evidence of record and concluded that
12 Plaintiff's medically determinable impairments could reasonably be
13 expected to produce the alleged symptoms, but that Plaintiff's
14 statements concerning the intensity, duration and limiting effects
15 of these symptoms were not entirely credible. (AR 23). The ALJ
16 discussed the evidence relating to Plaintiff's subjective
17 complaints (AR 22-25), and determined that Plaintiff's allegations
18 of significant limitations in her ability to perform basic work
19 activities, such as standing, walking and lifting, were not
20 credible. (AR 25).

21 The ALJ indicated that, while Plaintiff experiences bilateral
22 arm pain and left ankle pain, the evidence of record failed to
23 demonstrate that she is totally disabled as alleged. (AR 23). A
24 lack of supporting objective medical evidence is a factor which
25 may be considered in evaluating an individual's credibility,
provided that it is not the sole factor. *Bunnell v. Sullivan*, 947
F.2d 341, 345 (9th Cir. 1991).

28 ///

1 The ALJ noted that, with regard to Plaintiff's forearm pain,
2 nerve conduction studies performed in June of 2003 revealed no
3 electrodiagnostic evidence of any median mononeuropathy at the
4 wrist (carpal tunnel syndrome) or focal ulnar neuropathy. (AR 24,
5 102). An MRI of the wrist revealed only a small cyst on the palm
6 surface of the wrist and a possible tear on one image but these
7 did not correspond with her complaints of pain. (AR 24, 108). A
8 January 2004 cervical spine MRI demonstrated no abnormalities.
9 (AR 24, 168, 173). On January 8, 2004, Plaintiff reported that
10 her medications seemed to be doing well and she only experienced
11 increased forearm pain if she attempted to "overdo it," such as
12 shoveling snow. (AR 24, 168). A May 2005 examination revealed
13 full range of motion of her neck, no tenderness along the
14 trapezius, compression maneuvers for thoracic outlet syndrome were
15 negative on both sides, there was excellent pulses in her wrists
16 and no obvious deformity, atrophy or effusions of her upper
17 extremities. (AR 24, 271-272). Her range of motion in bilateral
18 upper extremities was noted as within full range with complaints
19 of increased pain with extremes of motion, but the test for carpal
20 tunnel syndrome (compression test) was negative bilaterally. (AR
21 24, 267).

22 With respect to Plaintiff's left ankle pain, the record
23 reveals that she had an immediate response to a cortisone
24 injection in May 2003 and her pain was resolved at that time. (AR
25 23, 150). It appears that she did not again have complaints
26 related to her ankle until August 2004. (AR 23, 172).

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1 Nevertheless, in February 2005, Plaintiff reported walking up to
 2 45 minutes at a time, four to five times a week. (AR 23, 287).
 3 There is no mention of ankle pain again until August 19, 2005,
 4 when Plaintiff presented for an update of her Department of Health
 5 and Human Services disability evaluation. (AR 23, 257). Her
 6 lower extremities demonstrated no edema, good pulses and only some
 7 decreased range of motion on the left ankle. (AR 23, 258). In
 8 September of 2005, Plaintiff underwent another steroid injection
 9 and reported complete resolution of the pain. (AR 23, 250-251).
 10 In March of 2006, Plaintiff indicated that the steroid injection
 11 had worked quite well until a month earlier. (AR 23, 231-232).

12 With regard to Plaintiff's complaints of anxiety and
 13 depression, the ALJ assigned great weight to the August 13, 2004
 14 consultative examination by Joyce Everhart, Ph.D. (AR 21, 24,
 15 141-145). Dr. Everhart opined that Plaintiff did not need help
 16 completing her activities of daily living, she presented as
 17 positive and cooperative with the ability to relate to people, her
 18 attention, concentration and intellectual ability appeared to be
 19 within normal limits, she retained the ability to complete complex
 20 multi-step tasks, her pace was good, and her train of thought was
 21 logical and coherent. (AR 145). Dr. Everhart diagnosed Plaintiff
 22 with a pain disorder associated with both psychological factors
 23 and a general medical condition, chronic, and gave Plaintiff a
 24 Global Assessment of Functioning ("GAF") score of 65.¹ (AR 144-
 25 145). Moreover, in August and November of 2004, state agency

26
 27 ¹A GAF of 70-61 is characterized as: "Some mild symptoms
 28 or some difficulty in social, occupational, or school
 functioning, but generally functioning pretty well." DIAGNOSTIC
 AND STATISTICAL MANUAL OF MENTAL DISORDERS 12 (3d ed. Rev. 1987).

1 reviewing physicians, Edward T. Beaty, Ph.D., and Michael Brown,
2 Ph.D., opined that Plaintiff's mental impairments were not severe.
3 (AR 175-188, 195-208).

4 Based on the foregoing, the medical evidence of record does
5 not support Plaintiff's allegations of disabling pain and
6 limitations. Since the ALJ notes many factors aside from the lack
7 of supporting objective medical evidence for discounting
8 Plaintiff's allegations, as discussed below, the ALJ did not err
9 in discounting Plaintiff's testimony as inconsistent with the
10 objective medical evidence of record.

11 The ALJ also noted that, although Plaintiff has received
12 treatment for the allegedly disabling impairments, the treatment
13 has been routine and conservative in nature. (AR 23). The ALJ
14 also stated that the record reflects significant gaps in
15 Plaintiff's history of treatment for her alleged disabling
16 impairments, suggesting that the routine and conservative
17 treatment has been generally successful in controlling her
18 symptoms. (AR 24). The ALJ indicated as well that "[g]iven the
19 claimant's allegations of totally disabling symptoms, one might
20 expect to see some indication in the treatment records of
21 restrictions placed on the claimant by the treating doctors. Yet
22 a review of the record in this case reveals no restrictions." (AR
23 24). The ALJ noted that "[n]o physician has limited the
24 claimant's activities." (AR 25). No treating or examining
25 medical professional of record has determined that Plaintiff has
26 significant or disabling limitations as alleged by Plaintiff.
27 This contrasts with Plaintiff's April 9, 2004 disability report
28 which indicates she stopped working because "[her] doctor felt it

1 was needed." (AR 52). Furthermore, as indicated by the ALJ, the
2 treatment Plaintiff has received for her complaints has been only
3 "routine and conservative" with significant gaps in treatment.

4 The ALJ further indicated that Plaintiff's pain complaints
5 relate to situational factors and have not been noted to impair
6 her for up to 12 continuous months. (AR 24). An impairment is
7 considered disabling only if it can be expected "to result in
8 death or . . . has lasted or can be expected to last for a
9 continuous period of not less than twelve months." 42 U.S.C. §§
10 423(d)(1)(A), 1382c(a)(3)(A). Again, no medical professional of
11 record has determined that Plaintiff has significant, long-term
12 limitations.

13 The ALJ also noted Plaintiff's "impressive functioning"
14 evidenced by a December 1, 2003 letter from Ms. Kaylor, an
15 instructor and counsel at the Life Skills Women's Programs, as
16 inconsistent with Plaintiff's allegedly disabling impairments.
17 (AR 24-25, 133-134). Plaintiff is reported to be an excellent
18 student, bright, committed and participatory in class. (AR 133).
19 It is further noted that Plaintiff had done an outstanding job of
20 using her time and attention to develop a plan for her future,
21 using counseling, job shadow experiences, class-time and after
22 class work to learn specialized computer software to improve her
23 possibilities and explore options. (AR 24-25, 133-134). Ms.
24 Kaylor opined that Plaintiff had done "an incredible job with very
25 little support" in her effort to correct problems associated with
26 the acting out of her teenage son, and additionally stated "the
27 fact that she cares for a 5 year old and goes to school is
28 amazing." (AR 133).

1 The ALJ generally references Plaintiff's activities of daily
2 living throughout his decision. (AR 21-25). It is well-
3 established that the nature of daily activities may be considered
4 when evaluating credibility. *Fair v. Bowen*, 885 F.2d 597, 603
5 (9th Cir. 1989). Inconsistent with Plaintiff's allegations of
6 disability, the record evidences Plaintiff was engaged in
7 activities such as walking 45 minutes at a time, four to five
8 times a week, shoveling snow, doing some yard work and caring for
9 a grandchild and her own small child and difficult teenager. (AR
10 133-134, 168, 222, 287, 314-315). Moreover, Dr. Everhart, as well
11 as the state agency reviewing consultants, reported that Plaintiff
12 did not need help to complete activities of daily living.

REPORT AND RECOMMENDATION ~ 13

1 ALJ did not err by concluding that Plaintiff's statements
2 concerning the intensity, duration and limiting effects of her
3 symptoms were not entirely credible. (AR 23).

4 **B. Severe Impairment**

5 Plaintiff asserts that the ALJ erred when he determined that
6 she had no severe medically determinable impairment. (Ct. Rec. 17
7 at 8-16). Plaintiff specifically argues that she provided ample
8 evidence, consisting of signs, symptoms, and laboratory findings,
9 proving the existence of severe problems with her upper
10 extremities, left ankle, and psychological condition. (*Id.*) The
11 Commissioner contends that the ALJ's step two finding was
12 supported by substantial record evidence and should be affirmed.
13 (Ct. Rec. 20 at 5-13).

14 Plaintiff has the burden of proving that she has a severe
15 impairment at step two of the sequential evaluation process. 42
16 U.S.C. § 423(d)(1)(A); 20 C.F.R. § 423(d)(1)(A), 416.912. To meet
17 this burden, Plaintiff must furnish medical and other evidence
18 that shows that she has a severe impairment. 20 C.F.R. §
19 416.912(a). The regulations, 20 C.F.R. §§ 404.1520(c),
20 416.920(c), provide that an impairment is severe if it
21 significantly limits one's ability to perform basic work
22 activities. An impairment is considered non-severe if it "does
23 not significantly limit your physical or mental ability to do
24 basic work activities." 20 C.F.R. §§ 404.1521, 416.921. "Basic
25 work activities" are defined as the abilities and aptitudes
26 necessary to do most jobs. *See*, 20 C.F.R. §§ 404.1521(b),
27 416.921(b).

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Step two is "a de minimis screening device [used] to dispose of groundless claims," *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996), and an ALJ may find that a claimant lacks a medically severe impairment or combination of impairments only when this conclusion is "clearly established by medical evidence" S.S.R. 85-28; *see, Webb v. Barnhart*, 433 F.3d 683, 686-687 (9th Cir. 2005). Applying the normal standard of review to the requirements of step two, the court must determine whether the ALJ had substantial evidence to find that the medical evidence clearly established that Plaintiff did not have a medically severe impairment. *Yuckert v. Bowen*, 841 F.2d 303, 306 (9th Cir. 1988) ("Despite the deference usually accorded to the Secretary's application of regulations, numerous appellate courts have imposed a narrow construction upon the severity regulation applied here."); *Webb*, 433 F.3d at 687.

16 In this case, the ALJ concluded that Plaintiff's left ankle
17 post traumatic osteoarthritis and bilateral wrist pain, left
18 greater than right, result in no greater than minimal functional
19 limitations. (AR 19-26). Accordingly, the ALJ found that
20 Plaintiff had no severe impairment or combination of impairments.
21 (AR 26). In making his step two determination, the ALJ thoroughly
22 discussed and evaluated all medical evidence of record. (AR 19-
23 26).

24 Plaintiff argues that her hearing testimony,² Dr. Everhart's
25 consultative examination, and records from her treating physician
26 evidence a severe mental impairment. (Ct. Rec. 17 at 14-15).

²⁸As discussed in Section A, the ALJ properly discounted Plaintiff's subjective complaints.

1 While Plaintiff correctly indicates that the August 2005 report of
2 Plaintiff's treating physician, Andrea M. McCrady, M.D., notes
3 depression and anxiety (Ct. Rec. 17 at 15; AR 256-258), the
4 purpose of the evaluation was for an update on Plaintiff's DSHS
5 disability,³ Dr. McCrady does not assess any resultant mental
6 limitations, and, historically, Dr. McCrady primarily treated
7 Plaintiff for her physical complaints. Dr. Everhart's August 13,
8 2004 consultative examination is the only psychological evaluation
9 of record and, with the exception of the state agency reviewing
10 reports, the only record assessing Plaintiff's mental functioning
11 ability. (AR 141-145).

12 Dr. Everhart opined that Plaintiff did not need help
13 completing her activities of daily living, she presented as
14 positive and cooperative with the ability to relate to people, her
15 attention, concentration and intellectual ability appeared to be
16 within normal limits, she retained the ability to complete complex
17 multi-step tasks, her pace was good, and her train of thought was
18 logical and coherent. (AR 145). Dr. Everhart diagnosed Plaintiff
19 with a pain disorder associated with both psychological factors
20 and a general medical condition, chronic, and gave Plaintiff a GAF
21 score indicative of only mild symptoms. (AR 144-145).
22 Furthermore, state agency reviewing physicians Beaty and Brown
23 opined in August and November of 2004 that Plaintiff's mental
24 impairments were not severe, and she had no restrictions of
25 activities of daily living, no difficulties in maintaining social

1 functioning, no episodes of decompensation and only mild
2 difficulties in maintaining concentration, persistence or pace.
3 (AR 175-188, 195-208).

4 There are no medical reports of record indicating that
5 Plaintiff's mental ability to do basic work activities is
6 significantly limited. The ALJ appropriately assigned significant
7 weight to Dr. Everhart's opinion, the only medical professional of
8 record to assess Plaintiff's mental functioning following an exam.
9 In accord with the evidence of record, Dr. Everhart concluded that
10 Plaintiff's was not significantly restricted by any psychological
11 impairment. (AR 141-145). Therefore, the evidence of record does
12 not support a finding that Plaintiff has a severe mental
13 impairment.

14 With regard to Plaintiff's bilateral wrist pain, nerve
15 conduction studies dated June 17, 2003 revealed no
16 electrodiagnostic evidence of any median mononeuropathy at the
17 wrist (carpal tunnel syndrome) or focal ulnar neuropathy. (AR 24,
18 102). On July 25, 2003, Paul C. Horn, M.D., examined Plaintiff.
19 (AR 106-107). Dr. Horn noted her hands and wrists exhibited no
20 asymmetry, atrophy or tropic change, wrist and finger range of
21 motion were normal and there was no discernable wrist instability.
22 (AR 106). An MRI of the wrist revealed only a small cyst on the
23 palm surface of the wrist and a possible tear on one image but
24 these did not correspond with her complaints of pain. (AR 24,
25 108). Dr. Horn suggested conservative therapy. (AR 106, 108).

26 On December 8, 2003, Dr. McCrady ordered an MRI of
27 Plaintiff's neck to rule out any possibility of cervical
28 radiculopathy. (AR 167). The January 2004 cervical spine MRI

1 demonstrated no abnormalities. (AR 24, 168, 173). On January 8,
2 2004, Plaintiff reported that her medications seemed to be doing
3 well and she only experienced increased forearm pain if she
4 attempted to "overdo it." (AR 24, 168). A May 2005 examination
5 revealed full range of motion of her neck, no tenderness along the
6 trapezius, compression maneuvers for thoracic outlet syndrome were
7 negative on both sides, there was excellent pulses in her wrists
8 and no obvious deformity, atrophy or effusions of her upper
9 extremities. (AR 24, 271-272). Her range of motion in bilateral
10 upper extremities was noted as within full range with complaints
11 of increased pain with extremes of motion, but the compression
12 test, the test for carpal tunnel syndrome, was negative
13 bilaterally. (AR 24, 267).

14 With respect to Plaintiff's left ankle pain, Nicholas Tanner,
15 D.P.M., examined Plaintiff on May 7, 2003, and indicated that she
16 had an immediate response to a cortisone injection and her pain
17 was resolved at that time. (AR 23, 150). She did not again have
18 complaints related to her ankle until August 2004. (AR 23, 172).
19 However, in February 2005, Plaintiff reported walking up to 45
20 minutes at a time, four to five times a week. (AR 23, 287).
21 There is no mention of ankle pain again until August 19, 2005,
22 when Plaintiff presented for an update of her Department of Health
23 and Human Services disability evaluation. (AR 23, 257). Her
24 lower extremities demonstrated no edema, good pulses and only some
25 decreased range of motion on the left ankle. (AR 23, 258). In
26 September of 2005, Dr. Tanner saw Plaintiff for complaints of
27 recurring left foot pain. (AR 250-251). Plaintiff underwent
28 another steroid injection with complete resolution of the pain.

1 (AR 23, 250-251). In March of 2006, Plaintiff reported that the
2 steroid injection had worked quite well until a month earlier.
3 (AR 23, 231-232).

4 A review of the medical record thus reveals that no physician
5 has determined Plaintiff has significant or disabling physical
6 limitations, and the treatment Plaintiff has received for her
7 physical complaints has been only routine and conservative.
8 Moreover, it is significant to note that Plaintiff has displayed
9 an ability to attend some college classes and has engaged in
10 activities such as walking 45 minutes at a time, four to five
11 times a week, shoveling snow, doing some yard work and caring for
12 a grandchild and her own small child and difficult teenager. (AR
13 133-134, 168, 222, 287, 314-315). There are no medical reports of
14 record indicating that Plaintiff's physical ability to do basic
15 work activities is significantly limited, and, as discussed in
16 Section A, the ALJ properly discounted Plaintiff's subjective
17 complaints. Therefore, the substantial weight of the evidence of
18 record does not support a finding that Plaintiff has a severe
19 impairment related to her physical condition.

20 Based on the evidence of record, as described above, the
21 ALJ's step two determination is supported by the substantial
22 weight of the record evidence. While Plaintiff has been treated
23 for physical and mental complaints, Plaintiff has periodically
24 reported the improvement of her symptoms with medications, steroid
25 injections and pool therapy (AR 150, 168, 231-232, 250-251, 271),
26 and, as indicated by the ALJ, no medical professional of record
27 has opined that her assessed impairments resulted in significant
28 limitations or could be expected to last for a continuous period

1 of not less than twelve months. The evidence of record does not
2 reflect that Plaintiff's physical or mental ability, singly or in
3 combination, to perform basic work activities is significantly
4 limited. Plaintiff thus has failed in her burden to demonstrate
5 that she has a severe impairment.

6 **CONCLUSION**

7 Having reviewed the record and the ALJ's conclusions, this
8 court finds that the ALJ's decision is supported by substantial
9 evidence and free of legal error. Plaintiff is not disabled
10 within the meaning of the Social Security Act. Accordingly, **IT IS**
11 **RECOMMENDED:**

12 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 16**)
13 be **DENIED**.

14 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 19**)
15 be **GRANTED**.

16 The District Court Executive is directed to enter this Report
17 and Recommendation and provide a copy to counsel and to the
18 referring judge.

19 **OBJECTIONS**

20 Any party may object to a magistrate judge's proposed
21 findings, recommendations or report within ten (10) days following
22 service with a copy thereof. Such party shall file with the
23 District Court Executive all written objections, specifically
24 identifying the portions to which objection is being made, and the
25 basis therefor. Attention is directed to Fed. R. Civ. P. 6(e),
26 which adds another three (3) days from the date of mailing if
27 service is by mail.

28 ///

1 A district judge will make a *de novo* determination of those
2 portions to which objection is made and may accept, reject, or
3 modify the magistrate judge's determination. The district judge
4 need not conduct a new hearing or hear arguments and may consider
5 the magistrate judge's record and make an independent
6 determination thereon. The district judge may also receive
7 further evidence or recommit the matter to the magistrate judge
8 with instructions. See 28 U.S.C. § 636(b)(1)(B) and (C), Fed. R.
9 Civ. P. 73, and LMR 4, Local Rules for the Eastern District of
10 Washington. The magistrate judge's recommendation cannot be
11 appealed to the Ninth Circuit Court of Appeals; only a district
12 judge's final order or judgment can be appealed.

13 **DATED** this 8th day of January, 2008.

S/CYNTHIA IMBROGNO
CYNTHIA IMBROGNO
UNITED STATES MAGISTRATE JUDGE